

Moderate Income Management Company, Inc., and Marineview Housing Company No. 1 and Local Union No. 560, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 22-RC-8352

July 14, 1981

DECISION ON REVIEW AND DIRECTION OF ELECTION

On November 28, 1980, the Acting Regional Director for Region 22 issued his Decision and Order in the above-entitled proceeding in which he dismissed the amended petition seeking a unit of all porters and maintenance employees at Marineview's two-building complex in Hoboken, New Jersey, on the basis that Marineview shares the State of New Jersey's exemption from the Board's assertion of jurisdiction pursuant to Section 2(2) of the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, Petitioner filed a timely request for review of the Acting Regional Director's decision on the grounds that he erred in declining to assert jurisdiction and, additionally, in finding Moderate and Marineview are not joint employers under the Act. Moderate and Marineview each filed a statement in opposition.

By telegraphic order dated December 29, 1980, the National Labor Relations Board granted Petitioner's request for review. Moderate and Marineview each relied on briefs previously submitted to the Acting Regional Director; Petitioner did not file an additional brief.

The Board has considered the entire record in this case with respect to the issues under review, including all briefs submitted by the parties, and makes the following findings:

Regarding the joint-employer question, the Acting Regional Director found that, as Moderate performed only a bookkeeping function for Marineview and had no direct control over Marineview's labor relations policies, they were not joint employers within the meaning of the Act.

Marineview Housing Company No. 1 is a New Jersey limited partnership created solely to purchase and operate the Marineview low to moderate income housing project. The housing project is comprised of two buildings in Hoboken, New Jersey. Marineview purchased the project pursuant to a mortgage agreement entered into with the New Jersey Housing Finance Agency (herein called NJHFA) in May 1973. The mortgage agreement contains general provisions concerning rental fees and tenant eligibility, and authorized the mortgagor

to enter into a management agreement. Marineview entered into such an arrangement with Moderate Income Management Company in May 1979. The agreement was renewed for a 1-year period in May 1980, and is currently in effect but may be terminated with or without cause by NJHFA or Marineview upon 30 days' written notice.

Moderate is a legal entity separate from Marineview, with its main offices in Trenton, New Jersey, and a site office at the Marineview project. There is no evidence of Moderate and Marineview having common ownership, directors, or officers.

Pursuant to the management agreement, Moderate is responsible for collecting rent from the tenants and for screening and recommending tenants for the vacant units. Moderate arranges for all services—utilities, extermination, and the like—and purchases all needed tools, supplies, and equipment, subject to Marineview's final approval. Moderate, on behalf of Marineview, pays all expenses, including all employee salaries. Moderate also prepares the proposed operating budget for Marineview's approval. The budget includes, *inter alia*, proposed rent increases and employee wage increases.

Moderate's office at the site is staffed by its own employee during hours set by Marineview. This office handles rentals and tenant complaints which are forwarded to the project superintendent for remedying.

Upon entering into the management agreement, Moderate inherited the current work force. It then formulated all the current labor relations policies, including policies for hiring, disciplining, and discharging employees, for setting work schedules, and for vacation and sick leave. The policies were all subsequently approved by Marineview pursuant to the agreement.¹

The implementation and day-to-day administration of labor relations policies is the responsibility of the housing project superintendent. He establishes all work schedules, hands out all assignments, and directs all unit work. The superintendent can authorize overtime, but must first clear it with Moderate's Trenton office. The superintendent does all hiring for the buildings. He advertises in local newspapers, interviews all applicants, and notifies the Trenton office to place the new employee on the payroll. The superintendent is free to discipline employees but discharges must first be cleared with the Trenton office.

¹ The agreement provides that:

On the basis of an operating schedule, job standards, and wage rates previously approved by [Marineview] and [NJHFA], [Moderate] shall investigate, hire, pay, and discharge the personnel . . . Such personnel shall in every instance be in [Marineview's] and not [Moderate's] employ.

The current superintendent was advertised for, interviewed, and recommended by Moderate to Marineview for its approval. Moderate personnel trained the new superintendent, and he obtains many of his work assignments from the site manager. The superintendent is expected to act in accordance with all of Moderate's policies and procedures at the risk of discharge by Moderate. Thus, the preceding superintendent was discharged for failure to work up to Moderate's standards, but not before Moderate brought in other personnel in an attempt to retrain the individual.

Marineview has little, if any, contact with the superintendent. All of its work requests for the superintendent are first transmitted to Moderate, which in turn forwards them to the superintendent.

Upon the foregoing, we find, contrary to the Acting Regional Director, that Moderate and Marineview are joint employers within the meaning of the Act.²

Thus, although Moderate provides no unit employees, it exercises direct control over Marineview's employees. Moderate, subject to Marineview's approval, promulgated the entire range of employee benefits and policies. Moderate developed the guidelines for the hiring of new employees, as well as the salary schedule. And, it is Moderate, not Marineview, who initiates wage increases for the unit employees.

The project superintendent has the most direct control of labor relations at the day-to-day level.³ Although technically Marineview's employee, he was selected by Moderate, trained by Moderate, looks to Moderate for his work assignments, and is ultimately responsible to Moderate. Indeed, in this regard it is significant that Marineview has no contact with the superintendent or the other unit employees; its only contact is through Moderate.

Therefore, while Marineview retains active and complete control over its employees' wages, hours, and other terms and conditions of employment by exercising its right of approval of all labor relations policies prior to implementation by Moderate, it is Moderate through its daily management of the properties which has equal, if not greater, impact upon the terms of the employees' working conditions. Such involvement is more than sufficient to

confer joint-employer status upon Moderate and Marineview.⁴

With regard to the jurisdictional issue, the Acting Regional Director found that Marineview's labor relations policies are effectively controlled by the State of New Jersey through NJHFA to such an extent that meaningful collective bargaining with Petitioner is precluded, and, therefore, that Marineview shared New Jersey's statutory exemption. Consequently, the Acting Regional Director dismissed the instant petition.

The record reveals that, pursuant to the mortgage agreement with NJHFA, Marineview forwards its budget, prepared by Moderate, to NJHFA for review. Moderate determines the various budgetary needs, including wage increases, based on its independent evaluation. There are virtually no NJHFA regulations or guidelines pertaining to Marineview's labor relations.⁵ A schedule is submitted to NJHFA with the budget showing the size of the work force and the expected costs, but, again, the initial determinations are independently made by Moderate.

The budget does not indicate that particular funds are being used for particular employee benefits such as sick leave or vacation leave. NJHFA, upon review of the budget, has proposed modifications both upward and downward, to which the Employers usually acquiesce. In one instance, NJHFA suggested increasing rent beyond the level decided on by the Employers. Once the budget has been cleared through NJHFA, all modifications requiring increased expenditures must be routed through NJHFA. There is no evidence such modifications are discouraged or are difficult to obtain. NJHFA does not have a representative at the housing project on a daily basis. NJHFA does, however, regularly send auditors who inspect the financial records, the purchasing procedures, and the physical condition of the buildings. The mortgage agreement makes no mention of labor relations or of any other labor standards.

As noted above, NJHFA holds Marineview's mortgage. The mortgage agreement sets forth the basic requirements for selecting tenants as well as NJHFA's right of access to all financial records, and provides for the establishment of various ac-

² The case relied on by the Acting Regional Director is distinguishable. In *Shannon & Luchs and Andrews Manor Associates*, 166 NLRB 1009 (1967), the owner supplied and directed the work force in accordance with its own labor relations policies. The management company merely handled financial matters and, thus, acted primarily as a bookkeeping service, unlike Moderate in the instant case.

³ The record supports and we adopt the parties' stipulation that the project superintendent is a supervisor within the meaning of the Act.

⁴ See *Hamburg Industries, Inc., Fidelity Services, Inc. & Industrial Technical Services, Inc.*, 193 NLRB 67 (1971). See also *Stoll Industries, Inc.*, 223 NLRB 51, 53-54 (1976). Cf. *Fidelity Maintenance & Construction Company, Inc., and Columbia Nitrogen Corporation*, 173 NLRB 1032, 1037 (1968).

⁵ Apparently, NJHFA has an "informal" guideline of one maintenance employee or porter for every 60 tenants. However, Moderate's president testified that it was free to deviate upward or downward from this ratio so long as it could demonstrate that the buildings were being properly maintained.

counts comprised of all rents received. Disbursements from these accounts are made in accordance with the approved budget, must be documented, and must be cleared by NJHFA before the funds will be released by NJHFA.

NJHFA's enabling statute, the New Jersey Housing Finance Law of 1967, N.J.S.A. 55:14J-1, *et seq.*, places no restrictions upon a mortgagor's labor relations. The act permits mortgagors to maintain an 8-percent return on their equity.

NJHFA provided Moderate and Marineview with a standard management agreement. NJHFA reviewed the agreement after execution, and retained the right to terminate it with or without cause upon 30 days' written notice to the parties. Notwithstanding the terms of the agreement (see fn. 1, *supra*) there is no evidence that NJHFA has ever reviewed or disapproved the Employer's labor policies.

Contrary to the Acting Regional Director, we find, based on the record as a whole, that the Employers have substantial control of their labor relations and, therefore, can engage in meaningful collective bargaining with Petitioner.⁶

The Employers have promulgated all of their labor relations policies subject only to their own discretion. They alone implement the policies on a day-to-day basis—interviewing, hiring, disciplining, and discharging employees, setting all work schedules and directing employees' work, and granting vacation and sick leave. NJHFA neither laid down guidelines for the Employers to follow in promulgating the policies⁷ nor is involved in any of the day-to-day decisions. Further, there is no evidence that NJHFA has ever approved or reviewed the Employers' labor relations policies notwithstanding the contractual right to do so, and there is no evidence that NJHFA is ever notified of any person-

nel actions. Rather, the evidence leads us to conclude that NJHFA's review of the budget is to ensure that the Employers have adequately provided for the maintenance of the buildings and for tenant services and, thus, adequate housing; and, at the same time, to ensure that Marineview has realistically budgeted its funds so that the mortgage loan provided by NJHFA will be repaid. Significantly, NJHFA provides the Employers with no operating funds—all such funds are apparently obtained from rental receipts. The fact that NJHFA reviews midterm budget modifications does not establish control over labor relations by NJHFA, for there is no evidence that NJHFA routinely denies or discourages midterm modifications, or that it would attempt to do so to thwart collective bargaining. Moreover, the right to review the budget, without more, is not, in and of itself, effective control of labor relations.⁸

Based on the foregoing, we conclude that the Employers do not share the State of New Jersey's statutory exemption from jurisdiction and that it will effectuate the purposes of the Act to assert jurisdiction over the employers. Accordingly, we shall reinstate the petition and direct an election in the unit stipulated to be appropriate by the parties.⁹

All porters and maintenance employees employed at the Employers' Hoboken, New Jersey, site, excluding the building superintendent, office clerical employees, guards, all other employees, and supervisors as defined in the Act.

[Direction of Election omitted from publication. *Excelsior* footnote omitted from publication.]

MEMBER JENKINS, dissenting:

The majority's finding that Moderate is a joint employer with respect to Marineview's employees in the stipulated unit is ill founded. The employees are employed by Marineview, are supervised by Marineview's project superintendent, and have little if any contact with Moderate's supervisory or management personnel. Moderate has its own em-

⁶ *National Transportation Service, Inc.*, 240 NLRB 565 (1979). The cases relied on by the Acting Regional Director have both been overruled. See *The Singer Company, Education Division, Career Systems, Detroit Job Corps Center*, 240 NLRB 965, 966 (1979), overruling *Teledyne Economic Development Company*, 223 NLRB 1040 (1976); *Young Women's Christian Association of Metropolitan Chicago*, 235 NLRB 788, 789 (1978), overruling *Young Women's Christian Association of Metropolitan Chicago*, 221 NLRB 262 (1975). In the case relied on by the Employers, *Kingsbury Corp.*, 22-RC-6989 (unpublished), we note that the Regional Director there applied the then existing "intimate connection" test rejected in *National Transportation, supra*. Additionally, we note that in *Kingsbury* the Regional Director relied on a section of NJHFA's Management Standards and Procedures which gave NJHFA the right to review the number, types, qualifications, and rates of pay of the employees required for the proper maintenance and operation of the property. In the instant case, the parties did not enter the Management Standards into evidence; however, assuming *arguendo* the Standards are still in effect, we do not believe the aforementioned section to be controlling. NJHFA merely has a right of review, not approval of the Employer's policies. Moreover, the evidence indicates that NJHFA has never reviewed any of the Employers' labor relations policies in any context other than review of the budget.

⁷ In this regard, Moderate's president testified that the policies and benefits were all promulgated based on Moderate's past experience in managing housing complexes.

⁸ See, e.g., *Loma Prieta Regional Center, Inc.*, 241 NLRB 1071 (1979); *Open Taxi Lot Operation—San Francisco International Airport*, 240 NLRB 808 (1979). See also *N.L.R.B. v. St. Louis Comprehensive Neighborhood Health Center, Inc.*, 633 F.2d 1268 (8th Cir. 1980).

Even assuming NJHFA would set outer limits for operating costs of the property, such would not preclude collective bargaining. See *The Singer Co., supra*; *N.L.R.B. v. Neighborhood Health Center, supra*.

⁹ The parties are in dispute as to whether the assistant building superintendent should be excluded from the unit as a supervisor. From the limited testimony, it appears that the assistant fills in for the superintendent in the superintendent's absence, hands out work assignments after they have been determined by the superintendent, directs some work, and also performs unit work. As the extent of his discretion in directing work is unclear from the record, we shall permit this individual to vote subject to challenge.

ployees, who are separately supervised. Moderate and Marineview are separate enterprises having no common ownership, directors, or officers, and neither has financial control over the other except to the extent that their contractual relationship makes them mutually dependent for economic advantage. Therefore, I find insufficient basis for deeming these two enterprises to be joint employers. *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 1222 (1962). Moreover, all of Marineview's financial decisions that could affect its conduct of labor relations are controlled by NJHFA, an exempt admin-

istrative arm of the State of New Jersey. NJHFA must approve Marineview's budget, any modifications requiring increased expenditures, and the rents to be charged. Thus, the range in which Marineview can make economic decisions regarding labor relations is so circumscribed as to make it unrealistic to suppose that it could bargain effectively without the participation of NJHFA. In these circumstances, Marineview shares NJHFA's exemption and the Acting Regional Director properly dismissed the petition.